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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

17 Wyoming Intellectual Property Holdings, LLC,

18 Plaintiff,

19 v.

20 Trackman, Inc.,

21 Defendant.

22 Case No. 2:23-cv-02518-JTT

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**PLAINTIFF WYOMING
INTELLECTUAL PROPERTY
HOLDINGS, LLC'S RESPONSE
IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS THE FIRST
AMENDED COMPLAINT**

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1 Plaintiff Wyoming Intellectual Property Holdings, LLC (“Plaintiff” or “WIPH”)
 2 respectfully submits this Brief in Opposition to Defendant’s Motion to Dismiss the First
 3 Amended Complaint [Dkt. No. 29] (“Defendant’s Motion”). As will be shown in greater
 4 detail herein below, Defendant’s Motion lacks merit and should be summarily denied.

5 **I. DISPOSITION OF THIS ISSUE AT THE PLEADING STAGE IS
 6 INAPPROPRIATE**

7 First and foremost is the obvious fact that this issue is presented to the Court at the
 8 pleading stage. As such, the Court is left with zero developed record from which it could
 9 possibly assess what was, and what was not, well-understood, routine, and conventional in
 10 the art *as of February 17, 2013*, not to mention a lack of familiarity with the disclosures and
 11 an absence of claim construction. The Asserted Claim here cannot and should not be
 12 summarily invalidated when there are *factual disputes* relating to the non-abstract nature of
 13 the Asserted Claim and the existence of an inventive concept. For example, Defendant fails
 14 to meet its burden to deny the factual basis in Plaintiff’s First Amended Complaint [Dkt. No.
 15 16] (“Amended Complaint”) as to “whether a claim element or combination of elements is
 16 well-understood, routine and conventional to a skilled artisan in the relevant field,” which is
 17 a question of fact that must be “proven by clear and convincing evidence.” *Berkheimer v.*
 18 *HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018).

19 Recent Federal Circuit jurisprudence has hampered courts’ authority to issue
 20 ineligibility determinations at a case’s earliest stages. For example, the Federal Circuit has
 21 recognized that resolution of section 101 motions is inappropriate until after claim
 22 construction. *See, e.g., MyMail, Ltd. v. ooVoo, LLC*, 934 F.3d 1373, 1379 (Fed. Cir. 2019);
 23 *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1273–74
 24 (Fed. Cir. 2012). The Federal Circuit has also recognized that deciding Rule 12(b)(6)
 25 motions invoking section 101 requires factual presumptions favoring non-movants.

26 At the pleading stage, the Court is required by law not only to accept all factual
 27 allegations in the operative complaint as true, but also to draw all reasonable inferences in
 28 the patentee’s favor. For example, In *Aatrix Software, Inc. v. Green Shades Software, Inc.*,

1 the Federal Circuit acknowledged how factual issues undergird both *Alice* steps. 882 F.3d
 2 1121 (Fed. Cir. 2018) (*citing Alice v. CLS Bank*, 573 U.S. 208 (2014)). Because a court
 3 considering a Rule 12(b)(6) motion must accept a complaint’s factual allegations as true, a
 4 complaint or counterclaim can recite concrete allegations regarding *Alice*’s underlying
 5 factual issues to guard its asserted patents from an early ineligibility determination. *See id.*
 6 at 1128; *see also Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009)
 7 (describing presumptions favoring non-movants in this Circuit); *M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda.*, 890 F.3d 995, 999 (Fed. Cir. 2018) (“In the procedural posture of a
 9 motion to dismiss, a district court must accept the uncontested allegations in the
 10 plaintiff’s complaint as true and resolve any factual conflicts in the affidavits in the
 11 plaintiff’s favor.”).

12 When the complaint contains concrete allegations that “the inventions as claimed
 13 were novel, non-obvious, unconventional, and non-routine,” the asserted patent can survive
 14 a Rule 12(b)(6) motion at *Alice* step two. *Aatrix*, 882 F.3d at 1128. Thus, accused infringers
 15 invoking section 101 in a Rule 12(b)(6) motion face an uphill battle.

16 It is now well established that patents are presumed valid. *See Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 97 (2011). Overcoming that presumption demands clear and
 17 convincing evidence, even in the eligibility context. *See Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1319 (Fed. Cir. 2019). Indeed, any fact “pertinent to the invalidity conclusion
 18 must be proven by clear and convincing evidence.” *Berkheimer v. HP Inc.*, 881 F.3d 1360,
 19 1368 (Fed. Cir. 2018). Plaintiff has not overcome these procedural obstacles.

20 Indeed, courts across the country have denied Rule 12(b)(6) and Rule 12(c) motions
 21 based on § 101 at the pleading stage. *See, e.g., Northwestern University v. Universal Robots A/S et al.*, No. 1:21-cv-00149, Dkt. No. 34 (D. Del. March 28, 2022); *Milliman, Inc. et al. v. Gradient A.I. Corp., et al.*, 1:21-cv-10865, Dkt. No. 43 (D. Mass. March 11, 2022); *Voxer, Inc. and Voxer IP LLC v. Facebook, Inc. and Instagram LLC*, 1:20-cv-00655, Dkt. No. 236 (W.D. Tex. February 15, 2022); *Trustees of Columbia University in the City of New York v. Nortonlifelock, Inc.*, 3:13-cv-00808, Dkt. No. 718 (E.D. Va. February 2, 2022); *Westwood*

1 *One, LLC v. Local Radio Networks, LLC*, 1:21-cv-00088, Dkt. No. 45 (N.D. Ind. January
 2 21, 2022).

3 **II. THE PATENT CLAIMS ARE PATENT ELIGIBLE UNDER 35 U.S.C. § 101**

4 Defendant's Motion raises the now customary boilerplate argument that all claims in
 5 the Asserted Patent ("Patent Claims") are invalid because they allegedly fail to recite patent-
 6 eligible subject matter. Defendant's Motion is premised on a gross oversimplification of the
 7 Patent Claims and the underlying premise that virtually no invention remotely relating to
 8 systems for training and/or instruction can be patent eligible. Accordingly, Defendant's
 9 Motion fails on the merits and should be denied.

10 As the Court is well-aware, the Patent Claims are presumptively novel and non-
 11 obvious, presumptively drawn to patent-eligible subject matter, and presumptively properly
 12 examined and allowed by the Examiner(s) at the United States Patent Office. *See, e.g.*,
 13 *Cellspin Soft, Inc. v. Fitbit, Inc., et al.*, 927 F.3d 1306, 1319 (Fed. Cir. 2019). Further, at the
 14 pleading stage, the Court is required by law not only to accept all factual allegations in the
 15 operative Complaint as true, but also to draw all reasonable inferences in the patentee's
 16 favor. *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*, 2020 WL 278481 at *4 (W.D.
 17 Tex. Jan. 10, 2020). Here, just as in the *Cellspin* case, the Complaint contains a multitude
 18 of specific and plausible statements of fact establishing the non-abstract nature of the Patent
 19 Claims.

20 The Amended Complaint alleges that, as of the Date of Invention in February 2013:
 21 [T]he inventions as claimed were novel, non-obvious,
 22 *unconventional, and non-routine.* (emphasis added).

23 *See* Dkt. No. 16 at page 4, ¶ 12.

24 The '671 Patent teaches systems and methods for identifying a
 25 difference between an actual action of a user and a standard
 26 action for the user, and for producing an instruction to instruct
 27 the user to change from the action of the user to the standard
 28 action for the user. The systems and methods of the '671 Patent
 can be used to monitor how a golfer swings his or her golf club,
 automatically compare the golfer's swing against a preferred

golf swing (such as the swing of a professional golfer), and produce an instruction to the golfer.

See Dkt. No. 16 at page 4, ¶ 14.

The facts as plead are plainly relevant to the presence of inventive concepts captured in the Patent Claims. These *specific* factual allegations in the Amended Complaint provide a basis in fact to conclude that the Patents Claims are indeed patent-eligible. These specific factual allegations, as well as the written specification of the Asserted Patent, define benefits and technological improvements captured in the Patent Claims over the prevailing art as of February 2013. For example, the written specification of the Asserted Patent states the following with regards to the “instruction” that is produced by the claimed “instruction component:”

As has been suggested, instruction **160** can involve more than defining the differences, *but also describe aspects not necessarily directly related to, in contact with, or the focus of a particular technique*. By way of example, a less experienced golfer may myopically view the end result of a swing to be purely a product of arm motion. However, the starting position, end position, and motion between both for head, shoulders, hips, legs and feet can be influential. In this regard, *a golfer's movement can be carefully tracked and statistical analysis applied to inputs and outputs at different stages of motion on different portions of the body to determine the changes that can be implemented to more accurately emulate a desired form*. (emphasis added).

See Asserted Patent 4:47-59.

Thus, the Patent Claims are patent-eligible. See *PPS Data LLC v. Jack Henry & Assoc., Inc.*, 404 F.Supp.3d 1021, 1039 (E.D. Tex. 2019) (“when the claimed technology overrides the routine and conventional sequence of events in order to provide a technological benefit, it is eligible at *Alice* Step Two”) (citing *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1304 (Fed. Cir. 2019)). Stated differently, claims such as these include an inventive concept when they provide a technological solution to a technological problem. *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1300 (Fed. Cir. 2016).

1 In *Berkheimer*, the Court of Appeals fully credited the specification’s disclosure of
 2 the state of the art, as well as its recitation of improvements over the art, as sufficient to
 3 create fact issues precluding summary judgment, as long as such were captured in the claims.
 4 *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1369 (Fed. Cir. 2018); *see also PPS Data*, 404
 5 F.Supp.3d at 1040-41 (“The Federal Circuit routinely relies on factual assertions in patent
 6 specifications not only as *some* evidence, but *conclusive* evidence of inventiveness”)
 7 (emphasis added). Of course, the benefits of the inventions, as noted in the Amended
 8 Complaint, are conferred due to the inventive concepts as claimed, as opposed to the mere
 9 practice of the “abstract idea” suggested by Defendant of “teaching how to perform actions.”
 10 Plaintiff’s Motion at 8.

11 Again, the specific factual allegations in the Amended Complaint are drawn directly
 12 from the intrinsic record of the written specification, and explain how the Patent Claims
 13 capture unconventional technological improvements over the art. As such, they can be
 14 considered as conclusive evidence of the facts as stated. *Berkheimer*, 881 F.3d at 1369; *PPS*
 15 *Data*, 404 F.Supp.3d at 1040-41.

16 Plaintiff’s Motion cannot overcome the factual assertions in the Amended Complaint
 17 and the factual assertions derived directly from the written specification, and therefore
 18 should be denied.

19 **A. *Alice* Step One – The Claims are Not Directed to an Abstract Idea**

20 At the Step One phase, the proper approach is to determine what the Patent Claims
 21 are “directed to” by evaluating what the patent itself asserts as the “focus” of the claimed
 22 advance over the prior art. *TecSec, Inc. v. Adobe, Inc.*, 978 F.3d 1278, 1292-93 (Fed. Cir.
 23 2020). Such an analysis must remain true to the language of the claims themselves in light
 24 of the specification and must be careful to avoid overgeneralizing the claims. *Id.* (citing
 25 cases). The focus of the claimed advance over the prior art in this case is a system that
 26 allows for a comparison of an action of a user, such as a golf swing, against a preferred
 27 action and that generates instructions to the user based on the comparison. The system of
 28 the Asserted Claim utilizes, *inter alia*, a “sensor” that captures the action of the user, and

1 “hardware” that communicates the action of the user to a “component set” that compares
 2 the action of the user to the preferred action and generates the instructions to the user.

3 The functions performed by the claimed system are not “mental processes that can be
 4 performed in the human mind or using pencil and paper.” *Trinity Info Media, LLC v.*
 5 *Covalent, Inc.*, 72 F.4th 1355, 1361-62 (Fed. Cir. 2023). Indeed, the “actions” discussed in
 6 the written specification, such as analyzing a golf swing, are not capable of being performed
 7 in the human mind. For example, as discussed above, the written specification of the
 8 Asserted Patent states the following with regards to the “instruction” that is produced by the
 9 claimed “instruction component:”

10 As has been suggested, instruction **160** can involve more than
 11 defining the differences, *but also describe aspects not*
necessarily directly related to, in contact with, or the focus of a
particular technique. By way of example, a less experienced
 12 golfer may myopically view the end result of a swing to be
 13 purely a product of arm motion. However, the starting position,
 14 end position, and motion between both for head, shoulders, hips,
 15 legs and feet can be influential. In this regard, *a golfer's*
movement can be carefully tracked and statistical analysis
applied to inputs and outputs at different stages of motion on
different portions of the body to determine the changes that can
be implemented to more accurately emulate a desired form.
 16 (emphasis added).

17 *See* Asserted Patent 4:47-59.

18 Carefully tracking a golfer's movement, applying statistical analysis to the inputs
 19 and outputs at different stages of motion on different portions of the body, and determining
 20 the changes that can be implemented to more accurately emulate a desired form are not
 21 steps that can be performed in the human mind, or with paper and pencil.

22 Further, an idea is abstract if it has “no particular concrete or tangible form.”
 23 *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014); *see also In re TLI*
 24 *Communications*, 87 F. Supp. 3d 773, 785 (E.D. Va. 2015) (An idea is abstract if it
 25 “describes a scheme or concept not tied to a particular concrete application”). Although the
 26 “precise contours of the ‘abstract ideas’ category” were not delimited in *Alice*, the Supreme
 27 Court has held that “abstract ideas” are not patentable. *Alice*, 573 U.S. at 222, 224, 227
 28 (citations omitted). The Supreme Court has also held that “abstract ideas” are not
 29 patentable. *Alice*, 573 U.S. at 222, 224, 227 (citations omitted).

1 Court and the Federal Circuit have provided some important principles. Namely, the
 2 Supreme Court has instructed that mathematical algorithms and fundamental economic and
 3 conventional business practices are abstract ideas. See *DDR Holdings, LLC v. Hotels.com*
 4 *LP*, 773 F.3d 1245, 1256 (Fed. Cir. 2014) (citing *Gottschalk, Acting Commissioner of*
 5 *Patents v. Benson, et al.*, 409 U.S. 63, 64 (1972) (finding mathematical algorithms patent
 6 ineligible); *Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (finding the “fundamental economic
 7 practice” of hedging to be patent ineligible); *Alice*, 134 S.Ct. at 2356 (same for
 8 intermediated settlement)).

9 In addition, claims that “simply instruct the practitioner to implement the abstract
 10 idea of intermediated settlement on a generic computer” are also abstract. *DDR Holdings*,
 11 773 F.3d at 1256 (citing *Alice*, 134 S.Ct. at 2359); *see also Ultramercial*, 772 F.3d at 715-
 12 16 (finding claims using advertising as a currency as applied to the particular technological
 13 environment of the Internet merely recited an abstract idea); *BuySAFE, Inc. v. Google, Inc.*,
 14 765 F.3d 1350, 1355 (Fed. Cir. 2014) (finding claims patent ineligible that did nothing more
 15 than implement the abstract idea of creating a “transaction performance guaranty” over a
 16 network); *Accenture Global Servs., GMbH v. Guidewire Software, Inc.*, 728 F.3d 1336,
 17 1344-45 (Fed. Cir. 2013) (finding claims patent ineligible that merely recited “generalized
 18 software components arranged to implement an abstract concept on a computer”); *Bancorp*
 19 *Servs., LLC v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1278 (Fed. Cir. 2012)
 20 (finding claims patent ineligible that recited the use of a computer to implement the abstract
 21 idea of managing a stable-value protected life insurance policy) (collectively “DDR
 22 Holdings Cases”).

23 At issue in the DDR Holdings cases, is that the Patent Claims “were recited too
 24 broadly and generically to be considered sufficiently specific and meaningful applications
 25 of their underlying abstract ideas … [and] in substance were directed to nothing more than
 26 the performance of an abstract business practice on the Internet or using a conventional
 27 computer.” *DDR Holdings*, 773 F.3d at 1256. These types of claims are not patent-eligible.
 28 *Id.*

1 Here, the Patent Claims do not fall within the contours of the DDR holdings cases.
 2 They have physical, tangible and specialized components that are directed to more than
 3 performance of an abstract idea. *See id.* The Patent Claims utilize a “sensor,” “hardware,”
 4 “communication hardware”, and an unconventional specialty programmed processor (or
 5 processing device) that implements the claimed “component set” that allows for a
 6 comparison of an action of a user, such as a golf swing, against a preferred action and that
 7 generates instructions to the user based on the comparison. Thus, the Patent Claims have a
 8 clear, concrete and tangible form.

9 **B. Alice Step Two – The Patent Claims Include an Inventive Concept**

10 As discussed above, the Patent Claims are not directed to an abstract idea. Further,
 11 even assuming, *arguendo*, that the Patent Claims are directed to an abstract idea, the Patent
 12 Claims nonetheless include an inventive concept.

13 Almost all inventions consist of new combinations of old elements. *See DDR*, 773
 14 F.3d at 1257 n.5 (“[o]n a fundamental level, the creation of new compositions and products
 15 based on combining elements from different sources has long been a basis for patentable
 16 inventions”). Thus, a claim element is not conventional for purposes of a Section 101
 17 analysis just because it appears in the prior art.

18 The Asserted Claim utilizes, *inter alia*, a “sensor” that captures the action of the user,
 19 and “hardware” that communicates the action of the user to a “component set” that compares
 20 the action of the user to the preferred action and generates the instructions to the user. This
 21 is accomplished by a specific claimed architecture in which relationships between physical
 22 elements are defined that enable the claimed functions. These elements and architecture are
 23 found in the Patent Claims and described in the written specification.

24 **III. CLAIM CONSTRUCTION**

25 Plaintiff asserts that at least the following terms/phrases require construction prior to
 26 the Court ruling on Defendant’s Motion: (1) “hardware that couples the housing to at least
 27 one of the user, equipment used by the user in performance of the actual action of the user,
 28

1 or a combination thereof;” (2) “comparison component; (3) “difference component;” (4)
 2 “selection component;” and (5) “instruction component.”

3 For example, Defendant argues that the claims are directed to the abstract idea of
 4 “teaching how to perform a task.” *See* Defendant’s Motion at 1. However, the “comparison
 5 component,” “difference component,” “selection component,” and “instruction component.”
 6 must be properly structured such that, for example, “a golfer’s movement can be carefully
 7 tracked and statistical analysis applied to inputs and outputs at different stages of motion on
 8 different portions of the body to determine the changes that can be implemented to more
 9 accurately emulate a desired form.” *See* Asserted Patent 4:47-59.

10 A proper construction of these phrases is *directly relevant* to the issue of whether
 11 “[t]he “claims merely recite use of generic, conventional components” and whether the
 12 elements of each claim “transform the nature of the claim into a patent-eligible application.”
 13 *See* Defendant’s Motion at 11 (citing *Bozeman Fin. LLC v. Fed. Reserve Bank of Atlanta*,
 14 955 F.3d 971, 980 (Fed. Cir. 2020). A proper construction of these phrases is also required
 15 to properly evaluate Defendant’s “abstract concept” arguments. Indeed, because Defendant’s
 16 motion is presented to the Court at the pleading stage, the Court is left with *zero developed*
 17 *record* from which it could possibly assess what was, and what was not, well-understood,
 18 routine, and conventional in the art as of February 2013, not to mention a lack of familiarity
 19 with the disclosure and the prosecution history of the Asserted Patent.

20 Further, other courts have previously denied a Rule 12(b)(6) motion to dismiss prior
 21 to claim construction, even when the defendant offered to adopt plaintiff’s proposed claim
 22 constructions. *See, e.g., GreatGigz Solutions, LLC v. East Texas Border Health Clinic d/b/a*
23 Genesis Primecare, Case No 2:21-cv-00370-JRG, Dkt. No. 29 (June 28, 2022 E.D. Tex.)
 24 (“the briefing demonstrates that much of the record is left undeveloped, and it is clear that
 25 numerous disagreements between the parties concerning the *Alice* analysis impinge on the
 26 construction of the disputed terms” . . . “further inquiry into issues such as the knowledge of
 27 one of ordinary skill in the art as to the disputed terms may be resolved at claim construction”
 28 . . . “the Court is not inclined to hypothetically adopt either party’s purported claim

1 constructions to push the case to an earlier resolution while such disputes remain").

2 Accordingly, Plaintiff's Motion is premature and should not be taken up until after
3 claim construction has occurred in this case and the factual record as to the state of the prior
4 art developed.

5 **IV. CONCLUSION**

6 Plaintiff has plead enough facts "to state a claim to relief that is plausible on its face."
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
8 U.S. 544, 547 (2007)). Defendant's Motion cannot overcome the factual assertions in the
9 Amended Complaint and the factual assertions derived directly from the written
10 specification of the Asserted Patents. Further, claim construction is required in order to
11 properly evaluate Defendant's "abstract concept" and "no inventive concept" arguments.

12 RESPECTFULLY SUBMITTED this 8th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2024, I electronically transmitted the foregoing document and all exhibits thereto to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants of record in this matter.

By: /s/ Kenneth M. Motolenich-Salas